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ALEXANDER L. STEVAS,

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALVIN W. SMITH, PETITIONER

VS.

HONEYWELL, INC. A DELEWARE CORPORATION, AND HONEYWELL INFORMATION SYSTEMS, INC. A DELEWARE CORPORATION, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, pro se,

Alvin W. Smith
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QUESTIONS PRESENTED

1. Whether and to what extent there was a lack of substantial justice when the U.S. District Court allowed petitioner's attorney to abandon this case just before trial without the court's permission and without a subsitute attorney forcing petitioner to act pro se during trial.

2. Whether and to what extent there was a lack of substantial justice during trial when the district court disparaged petitioner forced to act pro se while he was on the witness stand.

3. Whether and to what extent there was a lack of substantial justice when the U.S. District Court issued jury instructions which only addressed 50% of the issues in the complaint.

4. Whether and to what extent there was a lack of substantial justice when the U.S. District Court issued substantially erroneous findings of fact and did not consider

the evidence of pretext as required under Title VII, 42 USC Sec. 2000e et seq. (Civil Rights Act of 1964).

5. Whether the U.S. District Court committed a error when it directed the jury to determine the state of the mind of the discriminator rather than look at the purposeful acts of discrimination under the Civil Rights Act of 1866 (42 USC Sec. 1981).

THE PARTIES

The Petitioner

The petitioner, Alvin W. Smith (hereinafter referred to as petitioner or Smith) is a Vietnam War veteran honorably dischaged as a Captain in the Military Police Corp. The petitioner has a B.S. in mathematics, some graduate applied mathematics, a M.B.A. from the University of Minnesota, and a J.D. from William Mitchell College of Law in Minnesota. Petitioner is not an attorney but rather an expert in computer business. Petitioner is presently employed by Control Data Corp. in Minnesota as a consultant in supercomputer software development. Petitioner is a member of the Negro Race.

The Respondent

The respondent Honeywell, Inc. and its wholly owned subsidary Honeywell Informaton Systems, Inc. (both hereinafter referred to as respondents or Honeywell) is a multinational Minnesota based Corporation. Respondent is a major and influential employer in Minnesota.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A writ of certiorari is respectfully sought to review the judgement of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix, infra, pp. 46-55)is reported in 735 F.2d 1067. The opinion of the United States District Court for the District of Minnesota unreported.

JURISDICTION

The judgement of the U.S. Court of appeals for the Eighth Circuit (hereinafter referred to as the Court of Appeals) was entered on June 4, 1984. The denial of the petition for rehearing in the Court of Appeals was entered on July 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). This petition is submitted because:

1. The Court of Appeals has sanctioned a lower court's departure from accepted judicial procedure and fairness necessitate a call for the U.S. Supreme Court's power of supervision.

2. The Court of Appeals has decided not to address an important question of federal law and which should be decided by the U.S. Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Civil Rights Act of 1866, 42 U.S.C. Sec. 1981 (hereinafter referred to as Section 1981) is a codification of the

Thirteenth Amendment to the U.S. Constitution provides:

> "All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishemnts, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e. et seq. (hereinafter referred to as Title VII) provides:

> "Sec. 703. (a) It shall be unlawful for an employer...(1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his composition, terms, conditions, or privileges of employment, because of such individual's race, color...or (2) to limit, segregate or classify his employees...in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be cause of such individuals race, color, religion, sex, or national orgin."

STATEMENT OF THE CASE

This is an individual action for race discrimintion for violation of Title VII and Section 1981. Petitioner brought action against respondents for fraudent employment, wrongful termination and employment discrimination.

Petitioner was fraudently hired by the respondents from a competative company. He suffered disporportinate racial discrimination in assignment of responsibilities, office space, performance appraisals, salery treatment, promotional opportunities, use of employment benefits (i.e. vacation, etc.), job responsibilities, another segregated office and involuntary termination. There is no direct evidence of petitioner not performing his job.

This case was filed on June 2, 1981 by petitioner's then attorney, Mr. Steven M. Goldfarb, in the United States District Court in Minneapolis, Minnesota. The case was assigned to U.S. Judge Edward Devitt (hereinafter referred to as Judge Devitt)

of the U.S. District Court in St. Paul, Minnesota. On May 14, 1982, the case was referred to U.S. Magistrate Patrick C. McNulty (hereinafter referred to as the Magistrate) of the U.S. Court in Duluth, Minnesota.

The complaint initially consisted of five counts of employment related matters. In early 1982, Judge Devitt dismissed Count V (Unlawful Termination) as being beyond the court's pendant jurisdiction. On October 13, 1984, the Magistrate recommended dismissing Counts;I (Fraudent Employment), III (Minnesota Human Rights) and V (Minnesota Statute) as beyond the Court's pendant jurisdiction.

On October 25, 1982 (the last date to move against the Magistrate's recommendation), petitioner's attorney of 18 months abandoned this case without permission of the court and in violation of the employment contract. Petitioner could not find another attorney willing to take the case close to trial and was forced act as own lawyer in all further

legal actions in this case. Petitioner is not a lawyer but rather a computer expert. The incompetent presentation at trial was noted by the Magistrate.

On December 6, 1982, Judge Devitt ruled against the petitioners motion against the magistrate's recommendations. All of the counts dismissed in federal courts are being litigated in state courts.

On December 14, 1982, this action was referred to the Magistrate for trial with appeal to the Court of Appeals. The trial started on February 7, 1983 and lasted for 8 days. Count II (Title VII) was tried to the bench and Count IV (Section 1981) was tried to the jury.

Petitioner was forced to represent himself at trial. Petitioner did hire a lawyer to question petitioner while he was on the witness stand and provide sporadic trial consultation. Respondent was represented by 2 full time attorneys.

Petitioner lost the jury verdict 7 to 8. The Magistrate subsequently ruled against

the petitioner for the portion tried to the bench.

Petitioner thereafter moved for judgement notwithstanding the verdict, for new trial of the 1982 issue, to amend the court's findings of fact and for new trial of the Title VII issue. On May 5, 1983, these motions were denied by the Magistrate.

Petitioner then appealed to the Court of Appeals. On June 4, 1984 after not having oral argument, the appeal was summarily denied. Petitioner then requested the Court of Appeals rehear the evidence of errors in the findings of fact and rehear en banc the issue of proof of Section 1981 discrimination. On July 17, 1984 the Court of Appeals denied both of these request for rehearing.

REASON FOR GRANTING THE PETITION

Petitioner submit that the U.S. Supreme Court should exercise its power of supervision over a lower court to insure that; (1) a district court must not condone an

attorney abandoning his client without the court's permission thereby prejudicing his client's right of action, (2) a district court must not make disparaging remarks in the presence of the jury which would have the effect of influencing the jury against the individual forced to represent himself, (3) a district court must present to the jury all of the issues in the complaint supported by evidence and not a substantial subset, (4) a district court's findings of fact must be based on the evidence presented at trial, and (5) a district court in a Title VII case must consider evidence of pretext.

In general,each of the above items for consideration has a potential of falling under the penumbra of judical discretion, when taken as a whole has the effect of a departure from the standard of substantial justice.

Petitioner further submits that in Section 1981 cases, the jury must be directed to evaluate the purposeful harmful

acts of discrimination and not the mental state of the discriminator.

1. A DISTRICT COURT MUST NOT CONDONE AN ATTORNEY ABANDONING HIS CLIENT WITHOUT A SUBSITUTE ATTORNEY AND WITHOUT THE COURT' PERMISSION.

Petitioner's attorney of 18 months abandoned this case just before trial without the court's permission and without a subsitute attoreny (other then the petitioner who is not an attorney). The attorney abandoned this case at a time when petitioner was forced to immediately take the case pro se to make a timely motion to save a part of his case. The court was informed by the petitioner in that motion that the attorney has abandoned the case wrongfully. Yet, the court took no action to stop the missrepresentation.

Petitioner could not find another attorney willing to take over the case just before trial after 18 months of pretrial activities. Petitioner was therefore forced to go to trial pro se and make all subsequent motions. He was forced as a

citizen to enter motions questioning the integrity of the judicial proceeding. He was forced to act in this capactiy while working full time and without clerical support.

This under-representation was manifested by errors in trial, errors in motions and typing errors in briefs. Plaintiff is a computer expert not an attorney. The Magistrate stated on page 3 of his findings:

> "This resulted in some rather strange modes of interrogation and the introduction of a good deal of evidence extraneous to the issue."

It is a long standing rule that leave of the court is necessary before an attorney may withdraw from a case. U.S. v. Curry, 4 U.S. 106 (1848). The courts and the Code of Professional Responsibility require that the attorney seek permission from the court and take steps to avoid foreseeable prejudice. Summers v. Thompson, 444 F.Supp. 312 (Tenn 1978), Berry v. Berry, 388 A.2d 108 (Mo. 1978), Ashbrook v. Ashbrook, 366 N.E. 2d 667 (Ind. App. 1977), Code of Professional Responsibility DR 2-110(A).

This issue was not addressed by the Court of Appeals other then noting that petitioner was acting pro se.

Clearly, it is a prejudical error for the District Court to condone an attorney abandoning his attorney wihtout the Court's permission.

2. A DISTRICT COURT MUST NOT MAKE DISPARAGING REMARKS IN THE PRESENCE OF THE JURY WHICH WOULD HAVE THE EFFECT OF INFLUENCING THE JURY AGAINST THE INDIVIDUAL FORCED TO REPRESENT HIMSELF.

While petitioner was on the witness attempting to conduct his trial pro se and giving testimony by being questioned by a stranger attorney, the Magistrate sustained 14 objections to the testimony in the first day. There was no reason for some of the objections other than to interrupt the testimony,cast doubt on the issues in the complaint for which evidence was being presented, or to attack the credibiity of the pro se litigate.

The Magistrate also instructed the petitioner on the witness to testify about the testimony of other witnesses even

though the courtroom procedure was to exclude witnesses until after they testify (R1 Appendix pp. 56-57). The Magistrate even permitted the respondents counsel to question the petitioner on the witness stand about his planned trial tactics (R2 Appendix pp. 57-58). This gave the opposing side an unfair advantage by preempting the pro se litigate plans and tactics. The opinion of the pro se litigate about other witness remain within his providence as a litigator just as the opinion and trial tactics of a litigating attorney is within the providence of the litigating attorney.

The Magistrate discredited the petitioner on the witness stand by alluding before the jury that he would not believe the petitioner (R3 appendix pp 58-59).

Finally the Magistrate, for no apparent reason, threatened the petitioner in the presence of the jury with a contempt charge while the petitioner was on the witness stand. (R4 appendix pp. 60-61). This unfair tactic adversly effected the trial.

A "constitutional unfair trial" occurs where barriers and safeguards are so relaxed or forgotton that the proceedings are a spectacle rather than a trial. U.S. v. Augenbluck, 393 U.S. 348 (1969). The court has no duty to express opinion on nature, weight and effect of the evidence before the jury. Kelly v. Jackson, 31 U.S. 622 (1932). The credibility of the witness and the weight given to their testimony is for the jury. Kelly v. Johnson (supra). The jury has the duty to credit or discredit all or part of the witness testimony without the aid of the court. Moore v. Chesapeake & Ry. Co., 340 U.S. 573 (1951). This position is overwhelming supported throughtout the country.

The Court of Appeals felt that the remarks and rulings by the magistrate was not "sufficient to deny Smith a fair trial or to constitute reversible error". Improper remarks which are prejudicial or have a tendency to prejudice the minds of jurors against the unsuccessful party offer grounds

for a new trial. Snyder v. Mass., 291 U.S. (1934), Sawyer v. U.S., 220 U.S. 150 (1906), Haynes v. McLaughlin, 135 U.S. 584 (1889)

The effect of the Magistrate's action or lack of action was to prejudice the minds of the jury as well as to pre-empt the pro se litigate trial tactics. The trial was constitutional unfair.

3. A DISTRICT COURT MUST PRESENT ALL OF THE ISSUES IN THE COMPLAINT SUPPORTED BY EVIDENCE AND NOT A SUBSTANTIAL SUBSET.

At the conclusion of the trial, the Magistrate issued the following jury instructions:

> "The plaintiff claims that he was intentionally and purposefully discriminated against by both defendants because of his race.
>
> He claims that Honeywell Information Systems intentionally discriminated against him by -
>
> Hiring him for a job with one title and giving him a job with another.
>
> By providing him with office space which was less desireable then that allotted his white co-worker.
>
> He claims that Honeywell, Inc. unlawfully discriminated against him in regards to material aspects of his condition of employment, for instance-

Denying him office space comparable to that provided a white co-worker

Denying him the privilege of taking vacation time to study for law school exams.

Denying him travel necessary to do his job.

subjecting him to abusive language and other material aspects of the conditions of employment.

and

That Honeywell unlawfully terminated his employment."

The Magistrate identified 7 items for the jury to consider. There were 10 items in the complaint supported by evidence. The Magistrate also misstated 3 of the items in a prejudicial manner.

The Magistrate did not ask the jury to consider the following issues in the complaint.

1. Discrimination in compensation and benefits and the lack of a performance appraisal (paragraph 46(c) of the Complaint).
2. Discrimination in promotional opportunity (paragraph 46(D)).

3. Discrimination by giving plaintiff the title of manager without the responsibilities (paragraph 46(G)).

The Magistrate also misstated the following issues in a prejudicial manner:

4. Making false statements to induce plaintiff to join the company and these statements were not used against other new employees (paragraph 46(A)).

The Magistrate said:

"hiring him for a job with one title and giving him a job with another"

The effect is to belittle the issue.

5. Making great controversy over plaintiff's use of vacation time (paragraph 46(E)).

The Magistrate said:

"denying him the privilege of taking vacation time."

The issue was the sudden controversy when plaintiff wanted to take a legal vacation. Again the effect was to belittle the issue.

Therefore, the jury instructions presented by the Magistrate did not reflect

5 of the 10 issues in the complaint or 50% of the issues in controversy. The net effect is to belittle the complaint and not really bring all of the issues supported by evidence to the jury.

The Court of Appeals ruled that this allegation was not preserved for appellate review sence the petitioner pro se did not make the formal Rule 51 motion and that there was no error which "seriously affected the fairness, integrity or public reputation of judicial proceedings."

It is widely held that the court has a duty to submit all of the issues to the jury. Ranney v. Barlow, 112 U.S. 207 (1884), Herman v. Midland A.G. Service, Inc., 264 N.W.2d 161 (Neb. 1978), Cole v. Woods, 548 S.W.2d. 640 (Tenn. 1977), Hasson v. Ford Motor Co., 564 P.2d 857 (Cal. 1977).

Petitioner not being an attorney yet forced to act on his own behalf, was not aware of the formal Rule 51 objection. The objection would have obviously been made if he had been aware of its existance.

Petitioner's proposed jury instructions requested that the Court present all of the issues in the complaint to the jury and not a substantial subset.

In summary, an unfair error occurred when the Magistrate presented only 50% of the issues in the complaint to the jury. This unfairness was furthered by the prejudicial misstatement in the jury instructions. This is further illustration of the constitutional unfairness of this judicial proceedings.

4. IN SECTION 1981 CASES THE JURY MUST BE DIRECTED TO CONSIDER THE PURPOSEFUL HARMFUL ACTS OF THE PERPETRATOR AND NOT HIS/HER MENTAL STATE.

The issue here is the confusion in the definition of discrimination of Section 1981 discrimination. The heart of the judicial confusion is the distinction between "intent to discriminate" and "purposeful discrimination". At trial the Magistrate specifically instructed the jury to determine the intent to discriminate in the following jury instructions:

"The plaintiff's claim against the defendant in this case has three (3) essential elements, as follows:

FIRST: That the defendant intentionally discriminated against the plaintiff in connection with his employment, or with respect to termination of employment;

SECOND: That the effective reason for such intentional discrimination was the race of the plaintiff; and

THIRD: That as a direct result of such intentional discrimination, the plaintiff sustained damages.

Plaintiff has the burden of proving each of these essential elements by a preponderence of the evidence."

The Magistrate stated the following in his jury instructions:

"Intent ordinarily may not be proven directly because there is no way of fathoming or scrutinizing the operation of the human mind. But you may infer a person's intent from the surrounding circumstances. You may consider any statement made or act done or ommitted by a party whose intent is in issue, and all other facts and circumstances proven which indicate his state of mind."

Thus, the Magistrate specifically directed the jury to determine the state of the mind of the prepetuator of the harm. The inference is that if the actor did not mentally intend his act then there is

no racial discrimination.

A deranged mind may easly commit acts against individuals in a society without knowingly intending to commit the acts. The harm remains in spite of the state of the mind of the perpetuator.

Then using the above jury instructions, a deranged mind who commits an act of racial discrimination against another individual is not guilty of racial discrimination because he did not knowingly intend to racially discriminate. Yet, the victim of the racial discrimination suffered the burden of the act of racial discrimination whether or not the deranged mind was aware of his/her act.

Obviously Section 1981 exist to protect the victim from the harm of racial discrimination. Section 1981 is not intended to protect the racial discriminator's state of mind or thinking process. Indeed the individual has freedom to think anything he/she wishes, it is only when they act in racially discriminatory manner that the protection under Section 1981 is envoked.

The definition of Section 1981 discrimination is emboded in the words "purposeful discrimination' implying the act of discrimination. The U.S. Supreme Court discussed the dichotomy between the act and the state of mind of the actor in the case General Building Contractors Ass's v. Penn., 458 U.S. 375 (1982). There the Court stated the following starting on page 3148:

> "of course, this Court has found in the legislative history of the 1866 Act evidence that Congress sought to accomplish more then the destruction of state imposed civil disabilities and discriminiatory punishments. We have held that both §1981 and §1982 "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein... Nevertheless, the fact that the prohibitions of §1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Indeed, the relvant opinion are hostile to such implication...we explained that in §1 of the 1866 Act 'was ment to prohibit all racially motivated of the rights enumerated in the statute' ...the immediate evils with which the Thirty-ninth Congress was concern simply did not include practices that 'neutral on their face, and even neutral in terms of intent' Griggs v. Duke Power Co., 401 U.S. 424...(1971), but that had the incidental effect of disadvantaging blacks to a greater degree

than whites. Congress instead acted to protect the freedmen from intentional discrimination by those whose object was to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices'... The supports of the bill repeatedly emphasized that the legislation was designed to eradicate blantant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves... Our conclusion that §1981 reaches only purposeful discrimination is supported by one final obervation about its legislative history...With respect to the latter, 'official actions will not be held unconstitutional soley because it results in a racially dis porportionate impact' Arlington Heights v. Metropolitian Housing Dev. Corp., 429 U.S. 252...(1977). 'Even if a neutral law has a disporportionately adverse impact' upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.' Personnel Administrator of Mass. v. Feeney, 442 U.S. 256...(1976)... We conclude therefore, that Sec. 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination"

There is nothing in that passage which enables the deranged minded racial discriminator from being not guilty of racial discrimination simply because his state of mind was such that he did not know what he was doing. The Court said again that it is the purposeful act of discrimination and

not the state of mind of the discriminator which defines Section 1981 discrimination. (note the underlined words of action in the above passage).

In spite of this, there is still confusion in the courts in defining Section 1981 discrimination as state of mind or purposeful act. They are equating intent to purpose in other words they are equating mental state to act.

The Court of Appeals in this case illustrated this confusion in the following passage:

> "Appellant also objects to the jury instructions on the ground that the definition of discrimination was misleading and confusing because the instructions "asked the jury to look at intent of the defendants rather than the purposeful act of the defendants." Smith seems to be drawing a distinction without a difference... The Supreme Court has clearly stated that liability cannot be imposed under Section 1981 without proof of intentional (or purposeful) discrimination."

It is now relevant to look at the historical growth of the definition of Section 1981 discrimination from intent to

purposeful act.

The U.S. Supreme Court in Washington v. Davis, 425 U.S. 299 (1976, adopted an evidence requirement of "discriminatory intent" for proving race discrimination under Section 1981. In a later case , Village of Arlington Heights v. Metropolitian Housing Development Corporation, 429 U.S. 252 (1977) (hereinafter referred to as Arlington Heights), the U.S. Supreme Court softened the requirement of proving discriminatory intent. On page 265 of Arlington Heights the U.S. Supreme Court stated:

> "Davis does not require plaintiff to prove that the challenged action rested soley on racial discrimination purpose. . . ...When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judical deference is no longer justified."

The U.S. Supreme Court does not require a plaintiff to prove that an allegedly discriminatory action was motivated soley by a racially discriminatory intent but now by a discriminatory purpose. Again it is the act and not the state of mind which

controls.

Indeed, on pages 266 and 268 in Arlington Heights, the U.S. Supreme Court said that intent could be inferred from, the totality of circumstances without a direct showing of discriminatory purpose. The U.S. Supreme Court said that relevant factors for making such an inference include groosly disporportionate impact from a series of official actions taken for an invidious purpose in departure from normal procedures.

On page 266 of Arlington Heights, the U.S. Supreme Court suggested that intentional discrimination may also be inferred in cases of gregarious impact when the Court stated "some times a clear pattern is unexplainable on grounds other than race emerges from the effect".

In the successive case ,Personel Administrator of Mass. et. al. v. Feeney, the U.S. Supreme Court said on page 2296:

> 'Discriminatory purpose, however, implies more than intent as violation

of intent as awareness of consequences"

In the more recent case, General Building Contractors Assn'n v. Penn. (Supra), the U.S. Supreme Court said on page 3150:

> "We conclude, therefore, that Sec. 1981 like the Equal Protection Clause, can be violated only by purposeful discrimination."

Yet, there is still confusion about the definition of Section 1981 discrimination. Petitioner request that the U.S. Supreme Court grant Certiorari in this matter and clearly define Section 1981 discrimination as purposeful discrimination rather than intentional (state of the mind) discrimination. Petitioner further request that the U.S. Supreme Court distinguish this definition by requiring the courts to direct the jury to look at the purposeful acts of discrimination rather than the state of mind of the discriminator.

In this case the District Court instructed the jury to determine the state of mind rather than whether or not the

the actions were racially discriminatory. The emphasis was strongly on the state of the mind. The District Court errored when it directed the jury to determine the state of mind of the perpetuator, it should have directed the jury to look at the purposeful acts of discrimination. If the purposeful acts of discrimination were considered the decision would have been reversed.(assuming a fair trial). Even with the erroneous instruction the juries' decision was not unanimous.

The effect of the erroneous instructions was to direct the jury to potentially ignore evidence of the acts of discrimination. There was no evidence presented about the psychological profile of the prepetuators nor should such evidence be required in a race discrimination case.

This issue was presented to the Court of Appeals in request for rehearing en banc. The Court of Appeals choose not to rehear the merits and denied the request.

5. A DISTRICT COURT'S FINDINGS OF FACT MUST BE BASED ON THE EVIDENCE PRESENTED AT TRIAL.

The Magistrate states on page 12 of his order that his "Findings of fact can be influenced by his interpertation of controlling law'. The findings of fact must be based upon evidence at trial and not upon a contrivance.

The presentation of the errors in the findings of fact was in tedious detail in the Appellate Brief. The Court of Appeal summarly stated that "the evidence support the magistrate's findings".

For the sake of brevity, this petition will present a representative sample of the type of substantial deviation from the evidence.

The Magistrate stated on page 20 of his findings that plaintiff-petitioner was terminated for insubordination. The following are his examples of the insubordination:

> "A number of other events occurred which resulted in heated exchanges, interspersed with profanity, between Griffin and plaintiff. These matters included plaintiff's complaint, real

or imagined exclusion from preparing performance evaluation for a secretary which he shared with Maidman, the untimely submission of travel expense and tuition payment request, and plaintiff sending unauthorized telex messages." All of these resulting in complaints by plaintiff that white employees were receiving better treatment than he was, and that he was being verbably abused. It is of interest to note that at no time was plaintiff subjected to racial slurs or language which differed in any way from that directed at other employees, or that he was being required to comply with rules and regulations which other employees could ignore, or which were not specific directions from his supervisor based upon sound managerial decision."

For illustrative purposes the items underlined will be used show the substantial deviation from the evidence.

Item 1. Heated exchanges with profanity

Evidence was presented that Mr. Griffin had heated exchanges with a number of persons to plaintiff-petitioner (R5 appendix pp 61), Mr. Maidman the petitioner white co-worker (R6 appendix pp 62) other employees (R7 appendix pp 62-63). in fact Mr Griffin testified that he used what he coined "waterfront language" in the professional office environment (R8

appendix pp 63-64). Plaintiff complained about the verbal abuse to the appropriate authorities (R9 appendex pp 64-65)and was told to work with it.

Petitioner was not the initiator of the profanity nor the escalator of the conflict but Mr. Griffin. This not what the above passage would have one believe.

Item 2. Evaluation of secretary Performace:

Evidence was presented that petitioner Causasian co-worker was permitted to evaluate the performance of the Caucasian secretary who worked for both managers (petitioner and the co-worker). (R11 appendix pp 65-66). The petitioner was not permitted to evaluate this individual's performance (R12 appendix pp 66). The above passage inferred that this incident was "imagined".

Item 3. Untimely submission of travel expenses

Evidence was presented that once petitioner was two weeks late in submitting

an expense report (R13 appendix pp 66-67) because plaintiff was waiting the receipt for a car rented in Scotland (R14 appendix pp 68). The director of personnel testified that waiting for a receipt was a justifiable reason for turning in as expense report late (R15 appendix pp 68-69). Mr. Griffin said that petitioner turning in the expense report two weeks late was a significant event (R16 appendix pp 69-70). Evidence was shown that plaintiff's Caucasian co-worker routinely turned in his expense reports as late as three months without it being called a significant event (R17 appendix pp 70). The Magistrate findings of fact was worded in such a manner as to infer that the petitioner routinely submitted late "travel expenses". He also did not consider the disporportionate treatment between the white and black employee.

Item 4. Untimely submission of tuition request

The petitioner paid for most of his

education by means of the G.I. bill and hard work. Respondant paid for approximately 3 semesters on the normal employee tuition reinbursement program. There was no evidence of an untimely tuition payment request. Evidence was presented that all tuition payment request submitted by the petitioner was on time and in accordance with policy. (R18 appendix pp 70-71). The Magistrate's findings of fact just is not true and unsupported by evidence.

Item 5. Sending unauthorized telex messages.

There is no evidence of sending unauthorized telex messages. Evidence was presented at trial that once petitioner sent a telex message to Angers France to enforce the U.S. export laws as required by his job and in accordance with the work direction of Mr. Griffin and that afterwards in a memo Mr.Griffin told petitioner to watch the export activity in France, but make sure that all telex were reviewed by him before being sent out (R19 appendix

pp 71-73, Griffin impeached). There is evidence absoultely followed this new work direction (R20 appendix pp 73) . There is evidence that petitioner's Caucasian co-worker did not have the requirement for Mr. Griffin to review his correspondence before being sent out (R21 appendix pp 73-74). Here again the Magistrate findings of fact is not true and not supported by the evidence. Again the Magistrate did not consider the disporportionate treatment between black and white employees.

. . .

This representative sample illustrate that the Magistrate Findings of Facts is not based on the evidence but rather a contrivance. Indeed, the Magistrate stated on page 16 of his order issued after denying the motion to amend his findings of fact that "Hindsight indicates that the Findings of Fact could have been presented in better form."

In conclusion, the findings of fact were an unfair and inaccurate representation of the evidence. This inaccuracy exceeded the normal expectation for the margin of human error.

6. A DISTRICT COURT MUST CONSIDER EVIDENCE OF PRETEXT IN TITLE VII CASES.

On page 19 of the Magistrate's Findings of Fact he stated the following:

> "proving that an articulated justification for an employer's action is pretext is no more than exposing a discriminatory motive. To prove pretext, plaintiff had the burden of showing a similarity between his conduct and that of white employees, and a disparity or difference in treatment of such conduct when committed by white employees and that which he received. Kendrick v. Commission of Zoological Subdistrict, 565 F.2d 524 (8th Cir. 1977). He has failed to do so. Instead, the evidence is overwhelming that plaintiff was treated no differently than any other employee by Honeywell, and that his discharge was for insubordination. Insubordination is a legitimate ground upon which to base a discharge. Guy v. Swift & Co., 612 F.2d 383 (8th Cir. 1980).

The Court of Appeals stated the following in the case Ward v. Arkansas State Police, No. 82-1757, (8th Cir. August 17, 1983):

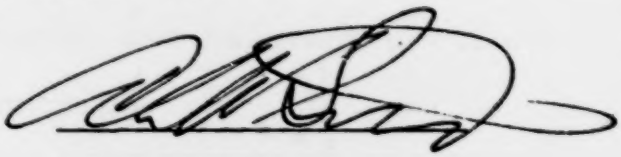
"the District Court to evaluate the evidence under the guidelines of McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Burdine sets forth the basic allocation of burdens and order of presentation of the proof in a Title VII case. First, the plaintiff must extablish by a preponderance of evidence a prima facie case of discrimination. Second, the burden shifts to the defendant to rebut the prima facie case by "explaining clearly" a legitimate, nondiscriminatory reason for its action. Finally, assuming a valid rebuttal, the plaintiff is entitled to prove by a preponderance of the evidence that defendant's reasons were merely a pretext. Texas Department of Community Affairs v. Burdine, 450 U.S. 252-56."

As shown above the evidence of pretext as defined by the Magistrate was not even considered nor was the evidence of disporportinate treatment considered. The Magistrate may have correctly stated the law but he did not apply the evidence. Again this is only one example, there were over a hundred citations of errors. The Magistrate simply did not consider the evidence as required in Title VII cases by both the U.S. Supreme Court and the Court of appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.



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October 3, 1984

APPENDIX

Here set forth successively, the order by the U.S. Court of Appeals for the Eighth Circuit denying the petition for rehearing, the opinion of the U.S. Court of Appeals for the Eighth Circuit, and relevant portions from the trial transcript.

1067MN 735 FEDERAL REPORTER 2d SERIES
No. 83-1744-MN

Alvin W. Smith

v.

Honeywell, Inc., etc., et al.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 17, 1984.

No. 83-1744-MN

Alvin W. Smith

v.

Honeywell, Inc.

UNITED STATES COURT OF APPEALS
DOE THE EIGHTH CIRCUIT

Submitted: May 15, 1984

Filed: June 4, 1984

Before HEANEY, Circuit Judge, FLOYD R. GISON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

PER CURIAM.

Alvin W. Smith brought this employment discrimination action under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. He alleges that Honeywell, Inc., and its subsidiary, Honeywell Information Systems, Inc. (Honeywell), discriminated against him because of his race in his initial hiring, in various action taken during the course of his employment, and in the decision to

to discharge him. After trial before a United States Magistrate,1/ the jury returned a verdict in favor of Honeywell on the §1981 claims, and the magistrate ordered judgement for Honeywell on the Title VII claims. Thereafter, Smith2/ filed a Motion for Amended Findings of Fact or a New Trial on his Title VII causes of action, and a Motion for Judgement N.O.V. or a new Trial on his §1981 cause of action. The magistrate denied the motions and Smith appeals.

1/ The parties consented to try the case before the Hon. Patrick J. McNulty, United States Magistrate for the District of Minnesota, pursuant to 28 U.S.C. §636(c)(1). Because Smith asserted the same facts in support of both claims, the parties agreed to try the case to the court and the jury simultaneously.

2/ Smith, a law school graduate, acted pro se at trial (though an attorney was present to assist him at various stages of the trial), and is proceeding pro se on appeal.

TITLE VII CLAIMS

Smith first contends that the trial court erred in denying him a new trial on his Title VII claims because the magistrate erroneously required him to show that Honeywell intentionally discriminated against him because of his race. Smith argues that a showing of intent is not required, and that to prevail he need only show that he was treated differently than other employees. This contention is without merit. A plaintiff alleging disparate treatment in a Title VII case has the burden of persuading the court that he is the victim of intentional discrimination. See, e.g. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Craik v. Minnesota State University Board, No. 82-1930, slip op. (8th Cir. March 23 1984). The trial court did not incorrectly state the applicable law, nor did it abuse its discretion in denying the motion for a net trial on the Title VII claims.

Smith next contends that the trial

court erred in denying his motion for amended findings of fact because the magistrate's factual determination on his Title VII claims were not consistant with the evidence presented at trial and ignored relevant portions of his complaint. During Smith's eight-day trial, evidence was presented addressing numerous allegations of discriminatory treatment.3/ "(A) trial judge need not make specific findings on all facts nor refer to every item of evidence introduced in a leenthy trial...." Craik v. Minnesota State University Board, supra, slip op. at 10. In the present case, it appears that the magistrate

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3/ Smith's complaint contains roughly ten separate allegations of discriminatory treatment by Honeywell, including claims that defendants provided him with undesirable office space; hired him for a job with one title and gave him a job with another; denied him travel necessary to do his job; subjected him to abusive language; and discriminated against him in promotional opportunities and other job benefits.

adequately considered the evidence presented at trial and the issues raised in the pleadings in arriving at his conclusions.

This Court may set aside factual findings about employer's discriminatory intent only if the findings are clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273 (1982). A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). No such mistake is apparent in the case at hand. A review of the file and records indicates that the evidence supports the magistrate's findings. The trial court did not err when it denied Smith's motion for amended findings of fact on his Title VII claim.

SECTION 1981 CLAIMS

Smith argues that the trial court erred in denying the motion for judgement n.o.vv. on his §1981 claims because "sufficient evidence was presented at trial...to prove

discrimination." The reviewing court "may set aside a jury verdict only when there is no evidence of substance upon which reasonable persons could differ." Ybarra v. Burlington Northern, Inc., 689 F.2d 147,150 (8th Cir. 1982). The evidence must be viewed in the light most favorable to the jury's verdict, giving the prevailing party the benefit of all reasonable inference which may be drawn from the evidence. See, e.g. Harris v. Pirch, 677 F.2d 681,683 (8th Cir. 1982). Applying these principles, the evidence on the record was sufficient for the jury reasonably to conclude that Honeywell did not intentionally discriminate against Smith because of his race. Therefore, the trial court correctly denied the motion for judgement n.o.v.

Smith next asserts that he should have been granted a new trial on his 1981 claims because the jury instructions did not address all the issues in his cimplaint. This allegation of error has not been properly preserved for appellate review. Smith did not

requestadditional instructions about particular acts of discrimination, nor did he alert the trial court to the alleged omissions in a timely manner as required by Fed. R. Civ. P. 51. See, e.g., Missouri Pacific R.R, Co, v, Star City Gravel Co., 592 F.2d 455, 459 (8th Cir. 1979). Moreover any plain error exception to compliance with Rule 51 is "confined to the exceptional case where error has seriously affected the fairness, integrity or public reputation of judicial proceedings." Rowe International Inc. v. J-B Enterprises, Inc., 647 F.2d 830, 835 (8th Cir. 1981). No such error is demonstrated here. Most of Smith's contentions were presented to the jury, and the instructions taken as a whole were adequate to submit the substance of Smith's unlawful discrimination claim to the jury. He has therefore waived this objection on appeal.

Appellant also objects to the jury instructions on the grounds that the definition of discrimination was misleading and confusing because the instructions

"asked the jury to look at intent of the defendants rather than the purposeful act of the defendants." Smith seem to be drawing a distinction without a difference. Presumably, he is again raising the objection made at trial; that the instructions incorrectly imposed on the plaintiff the burden of proving by a preponderance of the evidence that defendants had a racially discriminatory purpose or motive, and that it was not sufficient for Smith simply to show that he was black and was treated differently. The Supreme Court had clearly stated that liability cannot be imposed under §1981 without proof of intentional (or "purposeful") discrimination. General Building Contractors Ass'n., Inv. v. Pennsylvania, 458 U.S. 375 (1982). Smith is not entitled to a new trial on his §1981 claims on this bases.

Smith further contends that he is entitled to a new trial because the special verdict form given to the jury did not accurately reflect all the issues in his complaint. The form directly asked the jury to

determine whether the defendants had unfully discriminated against Smith. The instructions adequately informed the jury about what constituted "unlawful discrimination." The record reflectr that Smith agreed to have the issues presented to the jury on a special verdict form, and did not raise a timely objection to any errors or omissions in that form. This issue has thus not been preserved for appellate review.

Finally, Smith charges that the disparaging actions of the magistrate prejudiced the presentation of his case to the jury. The record suggests that the magistrate was frustrated at times by appellnt's actions at trial, particularly Smith's conduct as a witness. The magistrate sustained a number of objections to unresponsive answers by Smith, and at one point said: "You lawyers are all alike. you don't listen to the question. Listen to the question and then answer that question." (Tr. Vol. IV p.77). Later the Magistrate ordered an unresponsive answer stricken. instructing

Smith "to answer the question or face a contempt charge." (Tr. Vol. IV p. 189). In context, it appears that neither these nor other remarks and rulings by the magistrate were sufficient to deny Smith a fair trial or to constitute reversible error.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

LEDFORD,SS. Civil Action
File No. 3-81-343

ALVIN W. SMITH,
PLAINTIFF

VS.

HONEYWELL, INC. ET AL.,
DEFENDANT

TRANSCRIPT OF TRIAL

Reference R1

Volume V page 67 line 6 (Alvin W. Smith)

Q:Do you remember Mr. Hough's testimony yesterday that he was to review his teleses with Mr. Griffin?

A: I cannot testify as to his testimony.

The Court: You can answer the question. Do you remenber that testimony?

The witness: Yes, I do remenber that.

BY MR. KAEHLER:

Q: what was racially discriminatory about Mr. Griffin asking to review your telexes?

A. Well, you ask me -- you're asking me to draw conclusions based on some other testimony, which I can't.

Q:You stated the conclusion is you were racially discriminated against. I'm asking what is the conclusion that that's based on?

A:I can only base my conparison again upon the white Mr. Maidman who stated that he wasn't required to copy Mr. Griffin on his telexes where I was...

Reference R2

Volume V page 101 line 10 (Alvin W. Smith)

Q:...Your claim is based on the evidence that has been presented to this court up to this date, is that part of it or not all of it?

A:There might be some other evidence we will bring in. I mean, I'just testifying now.

Q:Well, then, sir let's find out what other kinds of evidence you have.

A:I think you'll have to wait until I present it.

Q:Sir, I'm asking my question now.

A:What evidence I'm going to provide besides this?

Q:What further evidence of intentional purposeful motives of racial discrimination are you going to present?

A:I don't know how to answer it. I'm sorry. I don't know how to answer your question, sir. You're asking me to present a case to the jury while I'm sitting here. I can't do that.

Q:Do you have any other evidence?

A: Oh, yes.

Q:Of purposefully motivated intentional racial discrimination/

A:Yes, I do.

Q:What is that evidence Mr. Smith?...

Reference R3

Volume IV page 114 line 1 (Alvin W. Smith)

Q:...you were given a title but not sufficient responsibility to go with the title; is that correct?

A:That's correct.

Q:What specifically are you referring to there?

A:That specifically address the definition

of the export/import job as well as appraising an individual who worked for both Robert Maidman and myself.

Q:What titles specifically do you feel you were given but not given the responsibility that would go with it?

A: Well the title manager to some degree means that you can at least write an appisal for a secretary or be responsible for your job.

THE COURT:Is there a job description that's printed or written?

MR. OHNSTAD: Yes, there is.

THE COURT: Let's use it.

MR. OHNSTAD:I don't think it will mean anything to anybody if the Court is--

THE COURT:It will mean far more to me than what Mr. Smith thinks the job is.

MR. OHNSTAD:Do you know where that is? (note: he was speaking to the witness Mr. Smith)

THE COURT:It will mean far more than Mr. Smith's interpertation.

MR. ONHSTAD: I would like the witness to find it, if he can...

Reference R4

Volume IV page 187 line 25

Q:Did you have an occasion while you were employed at Control Data Corporation to file a charge of race discrimination against your supervisor, Douglas Scafe?

MR. OHNSTAD: I object, Your Honor. We have hit upon what we discussed this morning.

THE COURT: The objection is overruled.

MR. OHNSTAD: I offer a document for the Court to review if the Court--

MR. KAEHLER: There is no document that I'm talking about.

THE COURT:At the moment we haven't gotten to the document yet.

THE WITNESS: would you repeat the question.

MR. OHNSTAD: Just a minute. I think the Judge has ruled.

BY MR. KAEHLER:

Q:Mr. Smith, while you were employed by Control Data Corporation, before you left them in July of 1977, did you have occasion to file a race discrimination complaint regarding your supervisor, Douglas Scafe,

with Mr. English?

A:Y s, and he discovered it was discrim-
ination.

THE COURT:Just a moment, sir. That answer may be stricken. the jury is instructed to disregard it and you are again instructed to answer the question or face a contempt charge.-- Do you understand?

THE WITNESS:Yes sir...

Reference R5

Volume IV page 127 line 19 (Alvin W. Smith)

Q:At any time did Mr. Griffin ever call you a lier or dummy?

A:Yes, sir.

Volume IV page 125 line 18 (Alvin W. Smith)

Q;Did you ever swear at Mr. Griffin?

A:Only I think I may have used a word like damn, only after being shouted at for a while and being provoked.

Q:Now there apparently was some incident where he hollered at you about parking; is that correct?

A:That's correct...

Reference R6

Volume II page 174 line 20 (Mr. Maidman)

Q:Did Mr. Griffin ever shout and holler at you when the door was open?

A:I don't recall exactly, but I'm sure he did upon occasion.

Volume II page 170 line 12 (Mr. Maidman)

Q:Did Mr. Griffin ever lose his temper to you or of anyone else he was dealing with in your presence?

A:To me, yes, upon occasion....

Volume II page 171 line 14 (Mr. Maidman)

Q:Do you if Mr. Griffin had a tendency to be abusive toward people?

A:I'm sorry to ask you, but you have to define for me what you mean by abusive.

Q:Profanity?

A:Yes.

Q:In a loud tone of voice?

A:He would to me on occasion...

Reference R7

Volume III page 58 line 21 (Mr. Jensen)

Q:...Are you aware of any difficulties Mr.

Griffin may have had with other parties in the corporation such as Morrie Longsworth, Harry Sweatt?

A:I know I had trouble with him at one point. I also know that he was a very ambitious person...I recall one time over the phone he got extremely upset against me. He wanted me to do something and I did not choose to respond the way he apparently wanted me to respond, and he ended up shouting to me over the phone...

Reference R8

Volume II page 79 Line 8 (Mr. Griffin)

Q:Mr. Griffin, do you in the normal course abusive language with people?

A:Not in the notmal course, but I do use abusive language.

Q:Do you use abusive language with your people working for you?

A:From time to time.

Q:Mr. Griffin--

A:I worked for seven years on the waterfront for years in the Navy and seven years in

the factories, and you pick up vocabulary that you would not find in Webster's Dictionary.

Reference R9

Volume III page 21 line 7 (Mr. Amundson)

Q:Mr. Amundson, did...did Mr. Smith come to you complaining about the verbal abuse of Mr. Griffin?

A:In which particular time frame?

Q:At all, Mr. Amundson.

A;In the later stages of the discussions that we had you made comment on that, yes.

Q:What is Honeywell's policy about supervisors verbally abusing their employees.

...

A:I'm not aware that there is a specific policy, but there are particular views on the language that I am sure of. I haven't been in too many environments in my life where a few words that may be,you know, people find distasteful, but they're utilized. Swearing is certainly one of these...

Q:Would you say that swearing is inappropriate communication in your opinion?

A:No

Q:Mr. Amundson, do you remember taking your deposition on the 21st day of January, 1982?

A:Yes.

Q:On page 21, line 12 the question was placed:...

QUESTION:Well, yes. Not to swear in general but to swear at an employee in a fashion.

ANSWER:I guess I consider swearing to be inappropriate in the context of conversation in most instances...

Volume II page 145 line 12 (Mr. Remington)

Q:You continue to state that Mr. Smith told you that he was not about to take abuse and requested your help..What abuse was he talking about?

A:I don't know...

Reference R11

Volume II page 176 line 14 (Mr. Maidman)

Q:Did you write performance appraisal for

the secretary?

A:I was asked to write a performance appraisal as to how she was performing her job, but since we both Mr. Smith and I shared her services, I believe that both of us were requested to write that appraisal.

Q:Do you know if in fact Mr. Smith ever wrote a performance appraisal for her?

A:I have no idea. I know I did mine.

Reference R12

Volume IV page 121 line 19 (Mr. Smith)

Q:would you review her performance?

A:No, I didn't.

Q:were you permitted to do so by Honeywell Corporation?...

A:Well, I was not permitted to do so.

Q:By whom?

A:By either Bill Griffin or whoever it was responsible for making that decision.

Reference R13

Volume II page 20 line 8 (Mr. Griffin)

Q:Mr. Griffin what expense report are you speaking of in that form?

A:You made a trip in late June early July to Europe and there was a company policy and I think most people followed it that when you came back from a trip you filled out an expense report and you cleared up any cash advances that you might have open.

Q:Did Mr. Smith do that?

A:Generally,yes.

Q:Did he do it in that specific instances

A:No....(on page 22 line 7)

Q:Mr. Griffin, is this the expense report which you referred to as taking place in July?

A:Yes.

Volume IV page 143 line 20 (Mr. Smith)

Q:Were you late in submitting your expense reports?

A:I tried not to be, but there was a time of significance where I was late two weeks...(page 144 line 14)

A:I think I kept my expense reports turned in earlier because so I could get my money back earlier...

Reference R14

Volume II page 23 line 6 (Mr. Griffin)

Q:At that point in time, when you requested the expense report Mr. Griffin, did Mr. Smith state to you that he did not have a receipt for car rental?

A:At about the third request you did yes, he did.

Q:But then did you tell Mr. Griffin--Mr. Smith to submit the expense report nevertheless?

A:It's pritty common that if some one loses a receipt that you estimate the expense and you make an adjustment at some point in time.

Q:Did Mr. Smith state to you that he didn't have a receipt because he was waiting for a bill?

A:Yes, and he was told to submit the report with an estimated amount.

Reference R15

Volume III page 30 line 6 (Mr. Amundson)

Q:Mr. Amundson, if an employee was filling

out an expense report, an employee didn't have one of the receipts, would that be some justification for turning the expense report in two week late?

A:It might be.

Reference R16

Volume I page 83 line 23 (Mr. Griffin)

Q:Showing you what has been marked as Plaintiff's Exhibit Number 4 do you recognize that Document?

A:Yes....(page 84 line 13)

Q:Would you state the name of the document?

A:It says, it has the title at the top Summary of Significant Events-Al Smith. It has a date of July 22, 1980. I do remember dictating this document...

Volume II page 19 line 19 (Mr. Griffin)

Q:...Mr. Griffin, going back to Plaintiff's Exhibit Number 4, ...Would you please reread that paragraph again?...

A:July 22, 1980. "I questioned Al this day on why a tuition aid request for summer school was submitted three months late, and also why I still didn't have a trip

report and expense report covering a trip to Europe the first week of July. He spoke to me in a very condescending manner and inferred that he would take care of it at his convenience and not mine...

Reference R17

The Court is referred to Plaintiii exhibit number 41 which is a business record of the degree of tardiness for expense reports.

Reference R18

Volume I page 131 line 20 (Mr. Griffin

A:July 22, 1980 . "I questioned Al this day on why a tuition aid request for summer school was submitted three months late...

Volume I page 136 line 7 (Mr. Griffin)

Q:Mr. Griffin, which document, which tuition request were you referring to as three months late?

A:It's not here...

Volume II page 3 line 7 to page 19 line 11

This lengthy citation is the testimony of a very belligerent witness (Mr. Griffin) which shows that there no late tuition .

requests.

Reference R19

Volume VII page 120 line 3 (Mr. Griffin)

Q:Why did you write the memo to Harry Sweatt saying that you were sorry?

A:The sending of this telegram was contrary to the agreement I had made with Mr. Sweatt some months previously that we would use his organization as the window for communication in the French affiliate. This was a direct communication into the French affiliate.

Q:Was that telegram sent by Mr. Smith contary to your instructions?

A:Yes....(on page 126 line 14)

BY MR. SMITH

Q:Mr. Griffin, you testified a short time ago about a November 19, 1979 letter to Mr. Sweatt concerning the Angers Plant, did you not?

A:Yes....

Q:And the date of the Memo is November 19, 1979.

A:yes.

. . .

Q:Was it Mr. Smith's responsibility for part of his job to establish communication with Angers?

A:Yes.

. . .

Q:Mr. Griffin placing before you what has been marked as Plaintiff's Exhibit Number 48, what is the date of that memo?

A:November 27th, 1979.

Q:Who wrote that memo sir?

A:I did.

Q:To whom was the memo written?

A:To you.

. . .

Q:Would you read that memo, sir?

A:"Please keep me informed of all telexes, contacts, and correspondence in your efforts to establish a window into Angers. Also, please reviec any new contacts or correspondence with me prior to releasing it either to Longsworth's ...

Q:That's the direction you gave to Mr. Smith

A:It was one of the directions.

Q:What was the date of that letter, sir?

A:November 27, 1979.

Q:What is the date of the telex?

A:November 16th, 1979.

Reference R20

Volume Iv page 123 6 (Mr. Smith)

Q:Were you allowed to send telexes when you woeked for Honeywell Corporation?

A:Yes, Iwas.

Q:Did you have to submit them to anyone first?

A:I had to submit --at the end I had to submit mine to Bill Griffin, at the beginning I had to give a copy of them to Bill Griffin....(Line 16)

Q:Did Mr. Maidman also send telex?

A:yes, he did.

Q:Did he carbon copy Mr. Griffin?

A:Sometimes he did, sometimes he didn't.

Reference R21

Volume II page 170 line 23 (Mr. Maidman)

Q:Did you always inform Mr. Griffin of your communications that you have with people

you serviced?

A:As I thought necessary.